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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 506

NEW YORK SHIPPING ASSOCIATION, INC., AMERICAN STEVEDORES, INC., BAY RIDGE OPERATING COMPANY, INC., HELLENIC LINES LTD., MARRA BROS., INC., JOHN W. McGRATH CORPORATION, NORTHEAST STEVEDORING CO., NORTHEAST MARINE TERMINAL CO., INC., INTERNATIONAL TERMINAL OPERATING CO., INC., DANIELS & KENNEDY, INC., PITTSTON STEVEDORING CORP., UNIVERSAL TERMINAL & STEVEDORING CORP., ALEXANDER CHOPIN, W. A. CRAIG, D. H. McKAY, R. W. NEITZ, F. L. RESPAUT, D. J. SCHMIDT, and J. B. YOUNG, *Petitioners.*

v.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION (AFL-CIO), RAYMOND McKAY, President SHORESIDE SUPERVISORS UNION, DISTRICT 2, MEBA (AFL-CIO), ROSARIO CICCONE, Executive Director, and SALVATORE DANTONE, JACK GIORDANO, THOMAS COSTA, PETER THOMASINO, FRANK DANTONE, DANIEL POTHIN, JOHN GARAMANTI, LEONARD NOVA and RALPH HANNEN, on behalf of themselves and all others similarly situated, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

PAGE

Question Presented 1

Reasons for Denying the Writ 2

Conclusion 10

APPENDIX:

A. Justice Harlan's Memorandum Denying A Stay Pending Certiorari 11

Table of Authorities

CASES:

A. H. Bull Steamship Co. v. National Marine Eng. B. Association, 250 F. 2d 332 (2d Cir. 1957), cert. denied 355 U.S. 932 (1958) 6, 7, 7n, 10n

Hanna Mining Co. v. District 2, MEBA, 382 U.S. 181 (1965) 4, 5, 6, 7, 7n

Local 1055, International Brotherhood of Electrical Workers, AFL-CIO v. Gulf Power Co., 175 F. Supp. 315 (N.D. Fla. 1959) 7n

National Labor Relations Board v. Budd Mfg. Co., 169 F. 2d 571 (6th Cir. 1948) 7n

Safeway Stores, Inc. v. Retail Clerks International Association, 234 P. 2d 678 (Cal. Dist. Ct. App. 1st Dist. 1951) 3n

Sakrete of Northern California, Inc. v. National Labor Relations Board, 332 F. 2d 902 (9th Cir. 1964) 7n

STATUTES:

PAGE

Labor-Management Relations Act, 1947, Title I, § 14(a), 61 Stat. 151, 29 U.S.C. § 164(a) (1964) 2, 2n, 3, 3n, 4, 5, 6, 7, 9n, 10n

New York Labor Law, § 807 ..... 9n

MISCELLANEOUS:

Legislative History of the Labor-Management Relations Act of 1947 .....5, 6n, 9

S. Rep. No. 105, 80th Cong. 1st Sess. 4

Cox, The Labor-Management Relations Act, 61 Harv. L. Rev. 1 (1947) 8

Smith, The Taft-Hartley Act and State Jurisdiction Over Labor Relations, 46 Mich. L. Rev. 593 (1948) 8

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Question Presented

1. Whether picketing by a majority union[1] of supervisory employees to gain collective bargaining with a cov-

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[1] Despite intimations to the contrary in the petition there is no issue in this case of stranger or minority unionism. At all times the respondent union represented a majority of those employees on whose behalf it sought recognition, namely the Brooklyn supervisors employed by the employers involved.

ered employer violates § 14(a) of the Labor-Management Relations Act of 1947 (61 Stat. 151; 29 U.S.C. § 164(a) (1964).[2]

Reasons for Denying the Writ

Supervisors employed in industries such as the maritime industry, the entertainment industry, the printing and building trades, all regulated by the Labor Management Relations Act of 1947, have engaged in collective bargaining for years—both prior to and subsequent to 1947. They have struck, picketed and engaged in all other types of union economic activity.

They have developed elaborate collective bargaining relationships incorporating many gains. In the decision attacked by this petition the New York Court of Appeals refused to write *finis* to those relationships. The Court refused to hold that the 1947 Amendments rendered *all* supervisor union economic activity unlawful in the face of statutory language withholding only the protection of federal and state labor relations laws from such activity.

The vast social consequences of the petitioners' argument, namely, the destruction of these collective bargaining relationships going back over half a century and involving tens of thousands of supervisory workers, would

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[2] § 14(a) provides:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

be enough to give rise to some doubt about its soundness. A glance at the life history of the statutory provision upon which they rely suggests that their argument borders on the frivolous. In the twenty-one years since the passage of the amendments, revolutionary years in our labor law, not one court, State or Federal, has read the Act as the petitioners do. As a matter of fact every Court that has spoken on this issue, albeit tangentially, has read the Act in exactly the same way as the New York Court of Appeals.[8] Nothing on the face of the Act itself, the language of which is clear and unambiguous, or in its legislative history supports the petitioner's view. Nor is there one word of support anywhere in the academic commentary for the petitioners' view. Their position should get equally short shrift in this Court.

The statutory issue in this case is not complicated at all. It is whether economic activity, picketing, striking or other forms of activity designed to gain collective bargaining is the compulsion "for the purposes of any law, either national or local, relating to collective bargaining," barred by § 14(a). Petitioners urged unsuccessfully be-

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[8] We exclude, of course, the lower court decisions reversed by the Court of Appeals in this case. No other Court has held squarely on the issue in this case—itself a telling fact. Petitioners' augury of doom if the Court of Appeals holding stands is pallid against the twenty-one years of collective bargaining in which no employer has ever litigated the precise issue. *Cf.* Safeway Stores, Inc. v. Retail Clerks Int'l Ass'n, 234 P. 2d 678, 20 C.C.H. Labor Cases, ¶66,522, p. 80,084 (Cal. Dist. Ct. App., 1st Dist. 1951) ("It is equally clear that the Congress by this enactment [of 14(a)] did not place any restriction on the common law or non statutory rights of supervisors to organize for the purpose of bargaining with their employers and to use any of the recognized legal methods of pressure (striking, picketing, etc.). . . ."

low, and now urge this Court, to amend Section 14(a) to excise "for the purpose of any law . . . relating to collective bargaining," and substitute "for any purpose relating to collective bargaining." In short petitioner wishes to have this Court rewrite the Act so as to deprive supervisors of the right to use any economic pressure at all in the course of collective bargaining.

Now the plain language of the Act itself does not permit this interpretation. It says that the Act bars compulsion of employers *"for the purpose of any law . . . relating to collective bargaining."* A "law relating to collective bargaining" is a law such as the Act itself, the Railway Labor Act, or a state labor relations act. That this was what was meant is clear from the explanation given by the Senate Committee that drafted it:

> "The bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. It merely relieves employers who are subject to the national act free *from* any *compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees.* S. Rep. No. 105, 80th Cong. 1st Sess., p. 5. See also, H.R. Rep. No. 245, 80th Cong., 1st Sess., pp. 13-17" (Emphasis supplied)

In other words neither the NLRB nor any state labor board can make it an unfair labor practice for an employer covered by the Act to refuse to bargain with a supervisors' union That is all the provision does; it does not reach trade union activity in any other way.

Since petitioners rely on this Court's decision in *Hanna Mining Co.* v. *District 2, MEBA,* 382 U.S. 181 (1965) it is pertinent to point out that the very language quoted above is reproduced as footnote 12 to this Court's language in

Hanna that is quoted at p. 13 of petitioner's brief as follows (curiously enough without the footnote!):

> "This broad argument (referring to MEBA's argument in *Hanna* that Sec. 14(a) preempted state action in the field) fails utterly in the light of the legislative history, for the Committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion *under the Act and under state law* to countenance or bargain with any union of supervisory employees. 12." (Emphasis added.)

The illuminating legislative gloss on Sec. 14(a) that furnished the foundation for this Court's view in *Hanna* that Section 14(a) only relieved "employers from any compulsion under the Act and under state law"—not from all compulsion whatever the source, makes clear that Congress' intent was only to deprive supervisors' economic pressure of its prior status as "protected" activity, not to outlaw it.

Senator Taft reiterated the view of his bill appearing in the Senate Report, *supra,* when he spoke on the floor in favor of overriding the Truman veto:

> "The bill provides that foremen shall not be considered employees under the National Labor Relations Act. They may form unions if they please, or join unions, *but they do not have the protection of the National Labor Relations Act. They . . . are generally restored to the basis which they enjoyed before the passage of the Wagner Act.*" 1 Leg. Hist. at 1008. (Emphasis added.)

Senator Claude Pepper, at the time a friend of labor, and also not one to understate the negative implications of this bill to which he was vigorously opposed, summed up Congress' understanding when he said:

> ". . . they (supervisors under the Wagner Act as construed by the NLRB) are denied, under this provision . . . the protection to which I have adverted.

> "That does not mean that they do not have the right of bargaining together with the employer, provided he recognizes them or *provided they may enforce that kind of cooperation,* but it does mean that they do not have the right, which they have today, to become a collective-bargaining group under the National Labor Relations Act." Id. at 1167 (emphasis added).

It was this uniform understanding of the impact of the provisions of the various bills, particularly of § 14(a), that was also reflected in the discussions cited below.[4]

The only other Federal Court to have had occasion to look at the issue, construed it exactly as did the New York Court of Appeals below. In *A. H. Bull Steamship Co.* v. *National Marine Engineers Beneficial Association,* 250 F. 2d 332 (2d Cir. 1957), cert. denied 355 U.S. 932, the Second Circuit said, per Chief Judge Clark:

> "The legislative history of Section 14(a) makes it quite clear that Congress intended the quoted clause *to describe statutes which require employers to bargain collectively or be guilty of an unfair labor practice or its state law equivalent."* 250 F. 2d 332, 339. (Emphasis added.)

Thus, on the threshold issue posed in the petition—namely whether "any law . . . relating to collective bargaining" means what it says—the Second Circuit's view, like this Court's view in *Hanna,* adds up to a rejection of petitioner's torture of the plain statutory language.

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[4] 1 Leg. Hist. 308 (House Report on H.R. 3020—embodying same provisions as §§ 2(3) and 14(a)); 331; 434 "it is contrary to national policy for other Federal or State agencies to compel employers who are subject to the National Board to treat supervisors as employees for the purpose of collective bargaining or organization activity"; 501 "The normal effect of such exclusion will be to force such employees to seek redress in self-help."; 613 Rep. Hartley—"they (supervisors) cannot obtain the benefits of this act"; 2 Leg. Hist. 1064; 1523; 1576; 1586.

The decisions in both *Hanna* and *Bull*, the only two decisions containing any direct reference to the issues here, construe the Act in terms of its plain and simple meaning. It was upon the authority of these two cases that the Court below properly rested its opinion.[5]

No Court reads Section 14(a) to have the scope proposed in the petition.[6]

No commentator has construed § 14(a) as having such sweep; on the contrary, all the commentary is the other way. Writing just after the Act was passed, Professor Archibald Cox, speaking of Sections 14(a) and 2(3) said:

> "The most important limitation makes it plain that the Act does not apply to foremen or other supervisors, thereby reversing a series of decisions in

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[5] The Court held: "Section 14(a) of the Labor Management Relations Act prevents supervisors' unions from claiming the benefit of statutes requiring employers to bargain collectively but does not limit their right to engage in otherwise lawful picketing (A. H. Bull Steamship Co. v. National Marine Eng. B. Ass'n, 250 F. 2d 332, 339, cert. den. 355 U.S. 932, see Hanna Mining v. Marine Engineers, 382 U.S. 181, 189)." App. D. Petition for Writ of Certiorari, p. 13a.

[6] All the federal cases that have had occasion to pass comment on the problem are in accord with the view in this brief: e.g. *Local 1055, International Bhd. of Electrical Workers, AFL-CIO* v. *Gulf Power Co.*, 175 F. Supp. 315 (N.D. Fla. 1959) (holding that a company must arbitrate its refusal to bargain with a supervisors' union and that a contract with foremen was enforceable, and legal, over the company's argument that since it could not be compelled to bargain by state law the contract to bargain was unenforceable); *Sakrete of Northern California, Inc.* v. *National Labor Relations Board*, 332 F. 2d 902 (9th Cir. 1964) (holding that it is not an unfair labor practice, or an unlawful act, for the union to demand coverage of supervisors under a collective bargaining agreement). See also: *National Labor Relations Board* v. *Budd Mfg. Co.*, 169 F. 2d 571 (6th Cir. 1948) ("There is nothing in the amended Act which restricts freedom of speech on the part of supervisory employees. . . . The amended Act merely changes the statutory method of enforcing those rights." Id. at 577).

> which the Board held, not only that the original Act guaranteed foremen the right to organize and bargaining collectively, but also that they were authorized to bargain . . . through the very unions which represented their subordinates. *The Taft-Hartley changes, while they do not outlaw foremen's unions, leave both foremen and employees to their economic weapons—the foremen to strikes and picketing to compel recognition,* the latter to discriminatory charges, espionage and blacklists to combat efforts to organize." Cox, The Labor-Management Relations Act, 62 Harv. L. Rev. 1, pp. 4-5 (1947). (Emphasis added.)

In short, the amendments left supervisors to just those remedies petitioners, in the name of this very same federal law, want taken away from them.

Professor Smith, of Michigan, writing on the preemption issue, posed by the then new Taft-Hartley Amendments, discussed their limited reach:

> "Section 14(a) of the Amended NLRA operates, on the other hand (comparing it with Section 14(b) which expressly gives the right to regulate union security to the States) as an absolute limitation on the authority of the states to require employers subject to the act to accord bargaining rights to supervisory employees . . .
>
> "By this provision Congress not only repudiated *for federal* purposes the old National Labor Relations Board's doctrine of the *Packard* case but also established a uniform national policy with respect to the bargaining rights of supervisory employees of employers whose activities affect interstate commerce." Smith, *The Taft-Hartley Act and State Jurisdiction Over Labor Relations,* 46 Mich. L. Rev. 593, 599-600 (1948).

What was this "uniform national policy"?

Was it, as petitioners argue that employers may not be compelled *by any means whatever,* including economic action, striking and picketing, to recognize and bargain with

a majority supervisors' union? Obviously not. None of the legislative history, not a word in it, would support such a view. Quite the contrary. As Professor Smith put it, consistent with all the legislative history, the pre-Wagner situation was restored:

> "The result is that this collective bargaining position of such employees is to be determined by the parties themselves, not by law. This restores the situation to the status quo ante the original NLRA." Id. at 600.

The purpose of the amendments was to withdraw the protection of the federal act from supervisor-employee organizational activity. *State* law is mentioned, but only because Congress wanted it perfectly clear that no state agency could do what the National Board could not do, 1 Leg. Hist. at 411; also at 331.

If this view of Section 14(a) is correct then there is no need to reach the other arguments advanced in the petition. Section 14(a) is not preemptive—that is precisely what this Court held in *Hanna*; it neither occupies the field to prevent State courts from enjoining supervisor economic activity (as *Hanna* held), nor does it require that they do so as petitioners urge here. All §14(a) does is prevent the States from requiring, under a State Labor Relations Law-type act, that employers otherwise regulated by the LMRA bargain with supervisors or their unions. However it does not prevent such bargaining, nor does it require that a State Court enjoin such activity despite that state's policy to the contrary.[7] That is the clear holding of this court in *Hanna,*

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[7] Petitioners attempt an argument (Point II) that builds on their view of § 14(a), namely that if § 14(a) bars the subject picketing, it is not only preemptive, but it *requires* state courts to enjoin such conduct, despite any state anti-injunction statutes such as NY Labor Law, § 807. (Point II of petition). The argument falls with the misreading of § 14(a). But even if it did not there is no authority anywhere for the proposition that Congress meant to override Norris-LaGuardia or its state counterparts. In meeting

supra, and it is the only fair conclusion from the language of the Act itself, the legislative history and the academic commentary.

Conclusion

Not a single state or federal court in 21 years has come to the conclusion advanced by the petitioner. If adopted petitioners' position would eviscerate the collective bargaining relationships enjoyed by thousands of supervisory employees in many industries. It would destroy these supervisors' hard-won gains when Congress neither wrote such a result, nor intended it, and when every authority that has had occasion to view the problem has rejected that approach. There is no merit whatever in the petitioner's argument nor is there any justification in law or the situation involved in this case for this Court to grant the petition.

Respectfully submitted,

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the identical contention in the *Bull* case, *supra*, Chief Judge Clark wrote:

> "And no mention is made in the statute, the reports or the Congressional debate indicating that the Norris-LaGuardia Act was henceforth to be inapplicable to peaceful strikes by supervisory personnel. Moreover contrary to Bull's contentions, denying the injunction on the basis of the Norris-LaGuardia Act does not compel Bull to bargain collectively with its supervisors in contradiction to the purpose of Section 14(a). Bull can refuse to bargain, discharge the supervisors, and be guilty of no unfair labor practice or conduct proscribed by any other law, either national or local relating to collective bargaining." 250 F. 2d at 339.

APPENDIX A

NEW YORK SHIPPING ASSOCIATION, INC.,
Petitioners,

v.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION (AFL-CIO), et al.,
Respondents.

Memorandum of Mr. Justice Harlan

While I am not prepared to say that the underlying issue in this case will not be deemed worthy of review by this Court, and am inclined to think that I have power to grant the requested stay, I am nonetheless constrained to deny this application. In my opinion, petitioners have failed to make such a showing of probable success on the merits as would justify the award of interim relief. Cf. *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 164. In addition I find little force in the argument that denial of a stay would moot the basic issue, and petitioners' delay in making this application leaves me unpersuaded that the balance of equities on this application favors them.

Application denied.

August 19, 1968.